UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	
This Document Relates To:	§	Civil Action No. H-01-3624
	§	And Consolidated Cases
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	
vs.	§	
ENRON CORP., et al.	§	
Defendants.	§	

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS CREDIT SUISSE FIRST BOSTON LLC'S, CREDIT SUISSE FIRST BOSTON (USA), INC.'S, AND PERSHING LLC'S MOTION TO DISMISS PLAINTIFFS' AMENDED CONSOLIDATED COMPLAINT

15-94

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page(s)

Rules, Statutes, Regulations & Legislative History

Secondary Sources

Defendants Credit Suisse First Boston LLC (formerly known as Credit Suisse First Boston Corp.) ("CSFB LLC"), Credit Suisse First Boston (USA), Inc. ("CSFB (USA) Inc.") and Pershing LLC (formerly known as Donaldson, Lufkin & Jenrette Securities Corp.) ("DLJ") respectfully submit this reply memorandum in further support of their motion to dismiss Plaintiffs' First Amended Consolidated Complaint ("Amended Complaint" or "Am. Compl.").[1]

Preliminary Statement

Our opening memorandum demonstrated that Plaintiffs' new claims against CSFB LLC, CSFB (USA) Inc. and DLJ should be dismissed for four independent reasons:[2] first, all of Plaintiffs' claims against new defendants CSFB (USA) Inc. and DLJ and the new '33 Act claim against original defendant CSFB LLC are time-barred; second, Plaintiffs' Section 10(b) claims against CSFB (USA) Inc. and DLJ fail to assert any particularized allegations as required by the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act ("PSLRA"); third, Plaintiffs' Section 12(a)(2) claims against CSFB LLC and DLJ are deficient because Plaintiffs do not have standing and the offerings in question were not made pursuant to a prospectus; and fourth, the Amended Complaint fails to allege any facts sufficient to hold CSFB LLC, CSFB (USA) Inc. or DLJ liable as a control person.

---

[1] The Memorandum of Law in Support of CSFB LLC's, CSFB (USA) Inc.'s and Pershing LLC's Motion to Dismiss Plaintiffs' First Amended Complaint, dated June 18, 2003, is cited herein as "Mem. at __". Lead Plaintiff's Memorandum in Opposition to the Bank Defendants' Motions to Dismiss the First Amended Consolidated Complaint, dated July 17, 2003, is cited herein as "Opp. at __." Plaintiffs' original Consolidated Class Action Complaint, dated April 8, 2002, is cited herein as "Orig. Compl."

[2] The new claims asserted in Plaintiffs' Amended Complaint, and at issue in the pending motion, are (i) the claims against CSFB LLC under Section 12(a)(2) of the '33 Act; (ii) the claims against DLJ under Sections 10(b) and 20(a) of the '34 Act and Section 12(a)(2) of the '33 Act; and (iii) the claims against CSFB (USA) Inc. under Sections 10(b) and 20(a) of the '34 Act and Section 15 of the '33 Act.

Plaintiffs' Opposition simply repeats the deficiencies in the Amended Complaint. For example, like the Amended Complaint, Plaintiffs' Opposition simply lumps all of the "Bank Defendants" together--regardless of the particular arguments made in our opening memorandum and settled law requiring this Court to consider the allegations against each defendant separately. When analyzed individually--as the law requires--it is clear that Plaintiffs provide no factual or legal basis upon which to hold any of CSFB LLC, DLJ or CSFB (USA) Inc. liable for the newly asserted claims.

First, with respect to the statute of limitations, Plaintiffs fail to establish that the Public Company and Accounting Reform and Investor Protection Act of 2002, commonly referred to as "Sarbanes-Oxley", extended the existing one-year statute of limitations that (as this Court has previously held) governs this proceeding. The plain language of Sarbanes-Oxley makes clear that it does not apply to claims, like Plaintiffs', which were brought after the statute was enacted or which sound in negligence. Absent the benefit of the longer statutory period, all of Plaintiffs' new claims against CSFB LLC, CSFB (USA) Inc. and DLJ are time-barred because Plaintiffs knew of those claims more than one year before filing the Amended Complaint and chose not to assert them.

Second, Plaintiffs' new Section 10(b) claims against CSFB (USA) Inc. and DLJ also lack particularized allegations against either defendant. Indeed, as Plaintiffs admit, the allegations supporting those claims are not new at all, but instead are the very same allegations Plaintiffs previously asserted solely against CSFB LLC. Plaintiffs' pleading tactic of lumping three separate entities into a single definition of "CS First Boston" (Am. Compl. ¶ 102(a))--ignoring entirely that CSFB LLC and DLJ were unrelated competitors for most of the relevant period--and then leaving the allegations against "CS First Boston" precisely as they were before,

when only CSFB LLC was sued, fails to satisfy the heightened pleading requirements of the PSLRA and Rule 9(b), and fails to provide CSFB (USA) Inc. or DLJ with any notice as to which allegations in fact are asserted against them individually.

Third, Plaintiffs essentially concede that their new Section 12(a)(2) claims should be dismissed: they confess to their lack of standing and also acknowledge that, in any event, the private placements that are the subject of those claims were not made "pursuant to a prospectus" as required by Section 12(a)(2).

Fourth, Plaintiffs cannot (and do not really try to) salvage their control person claims. They do not make any control person allegations as to CSFB LLC and DLJ, and make only a single boilerplate and entirely conclusory allegation (repeated three times) against CSFB (USA) Inc. Such allegations are woefully insufficient to rise to the level of "particularized facts" required by the Fifth Circuit and this Court.

Recognizing their failings, Plaintiffs offer a myriad of explanations, excuses, and promises in an effort to get this Court to forgive the deficiencies in their pleading. What Plaintiffs do not--and cannot--offer, however are the allegations necessary to sustain any of their new claims against CSFB LLC, DLJ and CSFB (USA) Inc. As such, the new claims in the Amended Complaint should be dismissed in their entirety.

Argument

I. PLAINTIFFS HAVE FAILED TO SHOW THAT THEIR NEW CLAIMS ARE NOT TIME-BARRED.

In our opening memorandum, we demonstrated that all of Plaintiffs' new claims against CSFB LLC, CSFB (USA) Inc. and DLJ are time-barred under the governing one-year statute of limitations because Plaintiffs were on notice of those claims more than one year prior to the filing of the Amended Complaint. (Mem. at 6-12.) In their opposition, Plaintiffs make

four arguments why their new claims are not time-barred: first, Plaintiffs claim that the "Bank Defendants" are "estopped" from asserting a statute of limitations defense (Opp. at 14-15); second, Plaintiffs claim that the statute of limitations was extended by the enactment of Sarbanes-Oxley (id. at 5-10); third, Plaintiffs claim that, even if Sarbanes-Oxley does not apply, they were not on notice of their claims more than one year prior to May 14, 2003 (id. at 15-17); and fourth, Plaintiffs claim that, in any event, their claims are timely because they relate back to the filing of the original consolidated complaint on April 8, 2002 (id. at 18-37). None of those arguments saves Plaintiffs' belated claims.

A. CSFB LLC, CSFB (USA) Inc. And DLJ Are Not Estopped From Asserting A Statute of Limitations Defense.

As an initial matter, Plaintiffs argue that "the Bank Defendants" are "estopped" from even asserting a statute of limitations defense because they failed to comply with the Court's January 27, 2003 Order establishing a time frame for filing "appropriate motions" "if they objected to being named defendants because a subsidiary or other entity was the real party in interest". (Opp. at 1, 5, 14-15; Order of Jan. 27, 2003) (emphasis added).) According to Plaintiffs, because "[c]ertain Bank Defendants" waited for three months to file such motions, and others, including CSFB LLC, "did not file motions at all", the "Bank Defendants" are responsible for the lateness of the Amended Complaint. (Id. at 15 (asserting that the "Bank Defendants induced the timing of Lead Plaintiff's amendment" through their "silence").) As to CSFB LLC, CSFB (USA) Inc. or DLJ, this argument makes no sense.

First, CSFB LLC did not fail to comply with the Court's January 27, 2003 Order by choosing not to file a real party in interest motion. (Opp. at 5.) As Plaintiffs know, CSFB LLC (the only CSFB-affiliated entity named in the original consolidated complaint) has never claimed that "Lead Plaintiff named the wrong part[y]" or that CSFB LLC was not the real party

in interest. (Id. at 1.) To the contrary, CSFB LLC is the broker/dealer entity that provided investment banking services to Enron, not some holding company. Because CSFB LLC had no such motion to make, that portion of the January 27, 2003 Order did not apply to it. Moreover, because the real party in interest was already named, CSFB LLC had no reason to believe Lead Plaintiff would name any other CSFB-affiliated entities.[3]

In the Amended Complaint, however, Lead Plaintiff added two new entities: CSFB (USA) Inc., a holding company that did not itself engage in any business with Enron; and DLJ, another broker/dealer entity that, prior to a merger of corporate affiliates in November 2000, was an entirely separate and competing investment bank from CSFB LLC with its own independent relationship with Enron.[4] Plaintiffs were aware of both of those entities at the time of the original consolidated complaint, and in fact specifically mentioned each of them in the allegations. (Orig. Compl. ¶¶ 102, 707.) Thus, this is not a "shell game" about finding the right entity. (Opp. at 1.) Plaintiffs knew about each of the three of the entities they have now sued, but deliberately chose to sue only one of them originally. Plaintiffs must now live with the statute of limitations ramifications of that choice.

Second, even if the January 27, 2003 Order had applied to CSFB LLC, equitable tolling could not apply. As the Supreme Court observed in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363 (1991), the case establishing the one-year/three-year

---

[3] Nor did Plaintiffs' January 14, 2003 letter stating that it may "amend or supplement to name subsidiaries of the Bank Defendants or file a new complaint with the same claims and adding subsidiaries" put CSFB LLC on notice of the new claims. Neither CSFB (USA) Inc. nor DLJ is a subsidiary of CSFB LLC--indeed, CSFB LLC has no subsidiaries. Moreover, that letter expressly stated that it would only add subsidiaries to "the same claims"; it did not purport to give notice of new claims, such as those Plaintiffs have added.

[4] The filing of a joint reply brief should not be interpreted as suggesting that prior to the merger those two entities acted collectively; they did not.

statute of limitations for Section 10(b), equitable tolling is "fundamentally inconsistent with the 1-and-3-year structure" for securities claims. Accord Friedman v. Wheat First Sec. Inc., 64 F. Supp. 2d 338, 344-45 (S.D.N.Y. 1999) (following Lampf and finding equitable estoppel inapplicable) (cited in Opp. at 14 n.8).[5] Moreover, even if Plaintiffs' claim were for equitable estoppel within the three year period of repose, CSFB LLC's purported "silence" in not filing a real party in interest motion (Opp. at 15) is insufficient to invoke that doctrine. See Friedman, 64 F. Supp. 2d at 346 (refusing to invoke equitable estoppel because "[i]t is insufficient that defendant's actions implicitly led plaintiffs to believe that they could forbear from bringing their claim").

Third, equitable tolling would not make Plaintiffs' new claims timely even it did apply. As discussed below and in our opening memorandum (see infra Part I.C; Mem. at 8-10), Plaintiffs were on notice of their newly filed claims as early as October 21, 2001, when the first lawsuits were filed, and at the latest by December 2, 2001, when Enron filed for bankruptcy. Thus, under the one-year statute of limitations, all of Plaintiffs' new claims had already lapsed more than one year prior to the January 27, 2003 Order.

B. The Sarbanes-Oxley Act Does Not Apply To Plaintiffs' New Claims.

Recognizing that their newly filed claims are too late under the one-year/three-year statute of limitations, Plaintiffs contend that the Sarbanes-Oxley Act expands the statute of limitations for the new claims asserted in the Amended Complaint to the earlier of two years

[5] The other cases cited by Plaintiffs are similarly unavailing. In Tyler v. Union Oil Co., 304 F.3d 379, 391 (5th Cir. 2002) (cited in Opp. at 14), the court permitted equitable tolling where the defendant fraudulently induced plaintiffs to release claims under a statute that contains an express provision for tolling under such circumstances. And in Berning v. A.G. Edwards & Sons, Inc., 774 F. Supp. 480, 485 (N.D. Ill. 1991), rev'd on other grounds, 990 F.2d 272 (7th Cir. 1993) (cited in Opp. at 14), the court refused to apply estoppel where, as here, the "[p]laintiffs were not prejudiced by any dilatory conduct of defendants".

from discovery of the facts constituting the alleged violation or five years after the alleged violation. (Opp. at 5-13.) As shown below, however, Sarbanes-Oxley (i) does not apply to proceedings--such as this litigation--that commenced prior to July 30, 2002, and (ii) does not apply to claims--such as the newly asserted Section 12(a)(2) claims--that do not sound in fraud.

1. Sarbanes-Oxley does not apply to proceedings, such as this one, that were commenced prior to July 30, 2002.

First, on its face, Sarbanes-Oxley does not apply to "proceedings", such as this one, that commenced prior to July 30, 2002. Instead, Congress expressly provided that the new limitations period under Sarbanes-Oxley "shall apply to all proceedings addressed by this section that are commenced on or after the date of enactment of this Act [July 30, 2002]." Pub. L. No. 107-204, 116 Stat. 801, § 804(b) (2002). Accordingly, this Court has already held that the extended limitations period under Sarbanes-Oxley "does not apply to Newby." In re Enron Sec., ERISA & Derivative Litig., 258 F. Supp. 2d 576, 601 (S.D. Tex. 2003).

In the face of the plain language of the statute and this Court's holding (which Plaintiffs dismiss as "dicta" (Opp. at 8)), Plaintiffs argue that the word "proceedings" refers to claims, and therefore "[t]he proceeding against the Newly-Added Defendants commenced on May 14, 2003 with the filing of the First Amended Complaint." (Opp. at 8.) That is wrong: Sarbanes-Oxley provided a longer statute of limitations for future proceedings commenced after the passage of the Act, not for future defendants added after the passage of the Act to an existing proceeding. See Black's Law Dictionary, at 1221 (7th ed. 1999) (defining "proceeding" as "[t]he regular and orderly progression of a lawsuit, including all acts and events between the commencement and the entry of a judgment") (emphasis added); 148 Cong. Rec. S7418-01 (daily ed. July 26, 2002) (Section 804 "by its plain terms, applies to any and all cases filed after the effective date of the Act") (emphasis added); Gerber v. MTC Elec. Techs. Co., 329 F.3d 297,

309-10 (2d Cir. 2003) (holding in a similar context that a provision of the PSLRA does not apply to newly added parties where the initial complaint was filed prior to the effective date of the PSLRA); cf. De La Fuente v. DCI Telecomms., Inc., 259 F. Supp. 2d 250, 258 n.5 (S.D.N.Y. 2003) (cited in Opp. at 8-9) (imposing sanctions and dismissing complaint filed before July 30, 2002 because "the statute of limitations established by the Sarbanes-Oxley Act applies only to proceedings commenced on or after July 30, 2002") (emphasis added).

Moreover, Plaintiffs' reading of the statute would subject different defendants in the same lawsuit to different statutes of limitations. According to Plaintiffs, the claims against CSFB LLC are subject to a one-year/three-year statute of limitations, while the those against CSFB (USA) Inc. and DLJ--entities Plaintiffs knew about when they sued CSFB LLC--are subject to the two-year/five-year statute of limitations. That makes no sense and is incorrect as a matter of law. See Gerber, 329 F.3d at 310 ("In the absence of any indication to the contrary, we doubt that Congress intended that courts would apply different sets of substantive and procedural rules to groups of plaintiffs asserting identical claims in a single action, depending on when those plaintiffs were added to the complaint."). Plaintiffs cannot circumvent the applicable statute of limitations by waiting until after July 30, 2002, to bring claims that could have been brought earlier.

Nor could Plaintiffs avoid the statute of limitations bar, as they suggest, simply by filing a new lawsuit. (Opp. at 9 ("Lead Plaintiff could have filed a separate action against the Newly-Added Defendants, in which case there would be no dispute over the application of the new statute of limitations to these defendants.").) It is well-settled that a plaintiff cannot simply file a new complaint to circumvent the rules that govern the amendment of a pending complaint. See, e.g., Oliney v. Gardner, 771 F.2d 856 (5th Cir. 1985) (affirming dismissal where plaintiff

filed a second complaint in an attempt to circumvent procedural rules applying to the amendment of complaints); Walton v. Eaton Corp., 563 F.2d 66 (3d Cir. 1977) ("[T]he court must insure [sic] that the plaintiff does not use the incorrect procedure of filing duplicative complaints for the purpose of circumventing the rules pertaining to the amendment of complaints . . . .").

To the extent Friedman v. Rayovac Corp., No. 02-C-308-C, No. 02-C-325-C, No. 02-C-370-C, slip op. (W.D. Wis. May 29, 2003) ("Friedman I") holds to the contrary, we respectfully submit that it was wrongly decided on this issue;[6] indeed, under the logic of Friedman I, plaintiffs in securities actions filed prior to July 30, 2002, could simply dismiss their proceedings, add new defendants and file a new action to gain the benefit of the longer statute of limitations. That is not the law. See Cent. Trust Co. v. Official Creditors' Comm. of Geiger Enters., Inc., 454 U.S. 354 (1982) (dismissing case where debtor voluntarily dismissed original petition and sought to file anew to take advantage of a change in the Bankruptcy Act that was inapplicable to pending cases).

Thus, the proceedings in Newby were commenced when the first complaint was filed--well before the enactment of Sarbanes-Oxley on July 30, 2002. As a result, the extended limitations period does not apply to Plaintiffs' new claims.

Nor is there any indication from Congress that Sarbanes-Oxley was intended to apply retroactively to existing cases; instead, as shown above, the language limits its application prospectively to future cases. Had Congress wanted Sarbanes-Oxley to apply to cases like Newby, it could easily have made the Act applicable to all proceedings pending on or commenced after the date of the enactment. See Landgraf v. USI Film Prods., 511 U.S. 244,

[6] In Friedman I, the court permitted the application of Sarbanes-Oxley where plaintiffs "could have filed a separate action . . . in which case there could be no dispute over the application of the new statute of limitations". Friedman I, slip op. at 23.

259-60 (1994) (suggesting that if Congress had wanted to prescribe "a general rule of retroactivity [it would have used] language comparable to . . . the new provisions 'shall apply to all proceedings pending on or commenced after the date of the enactment of this Act.'"); Martin v. Hadix, 527 U.S. 343, 354 (1999) (requiring an "express command" for retroactive application); cf. Gerber, 329 F.3d at 309-10 (rejecting similar claims in context of PSLRA and finding PSLRA did not apply to newly added parties because initial complaint was filed before that Act's effective date).[7] Congress chose not to do so.

Plaintiffs' reliance on the legislative history is unpersuasive. For example, Senator Leahy's statement that "[t]he section, by its plain terms, applies to any and all cases filed after the effective date of the Act, regardless of when the underlying conduct occurred" makes clear that Congress did not intend for the statute to have retroactive effect in pending cases. See 148 Cong. Rec. S7418 (daily ed. July 26, 2002) (statement of Senator Leahy) (attached hereto as Ex. A) (cited in Opp. at 11).

2. Sarbanes-Oxley does not apply to Plaintiffs' new '33 Act claims because they do not sound in fraud.

Finally, Sarbanes-Oxley does not apply to Plaintiffs' new '33 Act claims against CSFB LLC and DLJ for the additional reason that those claims on their face sound in negligence, not fraud. (Am. Compl. ¶ 1016.3 ("Plaintiffs assert negligence claims in this Claim for Relief.").) Plaintiffs' assertion that Sarbanes-Oxley "is not limited to fraud claims" (Opp. at 6) is

[7] Plaintiffs' citations to Roberts v. Dean Witter Reynolds, Inc., Case No: 8:02-cv-2115-T-26 EAJ, 2003 U.S. Dist. LEXIS 5676 (M.D. Fla. Mar. 14, 2003) and In re Initial Pub. Offering Sec. Litig., 241 F. Supp. 2d 281 (S.D.N.Y. 2003) (cited in Opp. at 8, 10) do not hold otherwise. The plaintiffs in both of those cases commenced their proceedings after July 30, 2002. Roberts, 2003 U.S. Dist. LEXIS 5676, at *7; Initial Pub. Offering, 241 F. Supp. 2d at 294 n.4.

inconsistent with the plain language of the statute, the relevant case law and the legislative history.

First, the plain language of the statute extends the statute of limitations only for "a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance". 28 U.S.C. § 1658. Notably, this language is identical to the language used in Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder, both of which are limited to fraud. See Securities Exchange Act of 1934 § 10(b), 15 U.S.C. 78j(b). Moreover, the limitation to fraud cases is underscored by the title of the provision governing the newly created statute of limitations: "Statute of Limitations for Securities Fraud". Pub. L. 107-204, 116 Stat. 801, § 804 (emphasis added).

Second, Plaintiffs' attempt to construe the statute more broadly by referring to the definition of "securities laws" referenced in the Act is foreclosed by the relevant case law: "Although it is true that the 1933 Act is a 'securities law' within the meaning of § 78c(a)(47), this does not resolve the issue. The longer statute of limitations does not apply to all securities laws; it applies to securities laws 'that involv[e] a claim of fraud, deceit, manipulation, or contrivance'." Friedman v. Rayovac Corp., No. 02-C-308-C, 02-C-325-C, 02-C-370-C, slip op. at 3 (W.D. Wis. June 20, 2003) ("Friedman II") (attached hereto as Exhibit B). Indeed, a case Plaintiffs cite holds that "on its face, the new act does not apply to claims brought under the 1933 Act. Thus, the one-year statute of limitations in § 77m still applies . . . ." Friedman I, slip op. at 21 (cited in Opp. 8-9). Thus, courts addressing this issue routinely hold that Sarbanes-Oxley does not apply to claims under the '33 Act. See Friedman II, slip op. at 3; In re Merrill Lynch & Co. Research Reports Sec. Litig., -- F. Supp. 2d --, No. 02 MDL 1484, 2003 WL 21518833,

at *19 (S.D.N.Y. July 2, 2003) (holding that Section 11 claims brought after the enactment of Sarbanes-Oxley are nevertheless subject to the one-year statute of limitations).[8]

Third, although "[w]hen a statute is unambiguous, no further inquiry into legislative intent is appropriate", Friedman II, slip op. at 4, the legislative history of Sarbanes-Oxley also supports that the extended statute of limitations is solely "for victims of security fraud". 148 Cong. Rec. S6491 (daily ed. July 29, 2002) (statement of Senator Kennedy) (attached hereto as Ex. C) (emphasis added); 148 Cong. Rec. S7358 (daily ed. July 25, 2002) (statement of Senator Leahy) (arguing for the extension of the statute of limitations "in securities fraud cases" because the statute in place had "barred fraud victims" from recovering) (attached hereto as Ex. D) (emphasis added); Senate Comm. on the Judiciary, The Corporate and Criminal Fraud Accountability Act of 2002, Report Together with Additional Views, S. Rep. No. 107-146, at 17 (May 6, 2002) ("[Section 804] would protect victims by extending the statute of limitations in private securities fraud cases.") (attached hereto as Ex. E) (emphasis added); 148 Cong. Rec. S7419 (daily ed. July 26, 2002) (statement of Sen. Leahy) (amendment would "set the statute of limitations in private securities fraud cases . . . .") (attached hereto as Exhibit A) (emphasis added).

Moreover, the legislative history makes clear that Sarbanes-Oxley was not intended to amend the existing statutory limitations period expressly provided in the '33 Act:

---

[8] Plaintiffs' reliance on In re Gibbons, 289 B.R. 588, 592 (Bankr. S.D.N.Y. 2003) (cited in Opp. at 7, 11) is completely misplaced. Gibbons does not even address the statute of limitations section of Sarbanes-Oxley, Section 804, but instead addresses a completely different section, Section 803. Unlike Section 804, Section 803 expressly applies to "violations of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934)" (emphasis added). This is in stark contrast to the language of Section 804, which refers only to "claim[s] of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) . . . ."

> "[The amended statute of limitations provision] is not intended to conflict with existing limitations periods for any express private rights of action under the federal securities laws."

Senate Comm. on the Judiciary, The Corporate and Criminal Fraud Accountability Act of 2002, Report Together with Additional Views, S. Rep. No. 107-146, at 29 (May 6, 2002). Thus, the "existing limitations period" set forth in the '33 Act by statute, 15 U.S.C. § 77m, remains intact.

C. Plaintiffs Were On Notice of Their Claims Prior to May 14, 2002.

Because Sarbanes-Oxley does not apply to Plaintiffs' newly added claims, Plaintiffs' claims are barred if brought more than one year after discovery of their claims or three years after the alleged violation (whichever is shorter). See Lampf, 501 U.S. at 364 (Section 10(b) claims); 15 U.S.C. § 77m ('33 Act claims). Plaintiffs argue that, even if this was the governing statute of limitations, their claims would nonetheless be timely because (1) inquiry notice is not sufficient to trigger the statute of limitations for Section 10(b) claims under Lampf (Opp. at 14); (2) Plaintiffs were not on notice of the "Bank Defendants' conduct" as of October 21, 2001 (id. at 15-16); and (3) Plaintiffs were not on notice of their claims against the "bank subsidiaries" as of April 8, 2002, when they filed the original consolidated complaint (id. at 16-17). Plaintiffs are wrong at every turn.

First, Plaintiffs' half-hearted attempt to claim that inquiry notice is not applicable under Lampf (Opp. at 14) is incorrect. Indeed, the only case they cite for this proposition, Berry v. Valence Tech., Inc., 175 F.3d 699 (9th Cir. 1999), itself provides that "every circuit to have addressed the issue since Lampf has held that inquiry notice is the appropriate standard." Id. at 704 (citing cases in the Second, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits)

(emphasis added).[9] Accord New England Health Care Employees Pension Fund v. Ernst & Young, LLP, No. 01-6523, 2003 WL 21540666, at * 4 (6th Cir. July 9, 2003) ("None of our sister circuits, so far as we know, has held that constructive discovery cannot suffice to start the one-year clock running."). Moreover, the Fifth Circuit applies an inquiry notice standard. See Jensen v. Snellings, 841 F.2d 600, 606-7 (5th Cir. 1988) (the statute begins to run as soon as "the plaintiff discovers, or in the exercise of reasonable diligence should discover, the alleged fraudulent conduct"); Topalian v. Ehrman, 954 F.2d 1125, 1134-35 (5th Cir. 1992) (finding inquiry notice applicable). Here, Plaintiffs were on both actual and inquiry notice of their claims for more than a year prior to the filing of the Amended Complaint. (Mem. at 8-10.)

Second, Plaintiffs argue that "while plaintiffs may have been on notice about Enron's fraud in the late fall of 2001, the Bank Defendants' conduct did not begin to come to light until much later." (Opp. at 16.) But that argument--which is supported by nothing more than Plaintiffs' bald assertion--ignores all of the "public information" that can be "imputed" to Plaintiffs. Berry, 175 F.3d at 703 n.4. For example, by the Fall of 2001, Plaintiffs were clearly on notice of Enron's allegedly false financial statements, which were incorporated into the offering documents that are now the subject of Plaintiffs' new '33 Act claims. Moreover, the knowledge a plaintiff must have to trigger the limitations period is merely that of "the facts forming the basis of his cause of action . . . not that of the existence of the cause of action itself." Jensen, 841 F.2d at 606 (internal quotation marks omitted).

Third, Plaintiffs contend that they "did not have notice of certain Bank Defendants' conduct as of April 8, 2002, . . . much less . . . the information necessary to name

[9] The Berry court also noted that, even under an actual discovery standard, "[c]ourts can impute knowledge of public information". 175 F.3d at 703 n.4.

bank subsidiaries as § 10(b) defendants." (Opp. at 16.) Whatever Plaintiffs knew about the other "Bank Defendants", it is clear from the original consolidated complaint itself that Plaintiffs knew everything they needed to know to name CSFB (USA) Inc. and DLJ at that time. Those entities were specifically identified in the original consolidated complaint, and not a single new factual allegation about them was added in the Amended Complaint. (Orig. Compl. ¶¶ 102, 707.) Indeed, elsewhere in the Opposition, Plaintiffs concede that the allegations from the original consolidated complaint "are fundamentally unchanged in the First Amended Complaint" (Opp. at 71), and cite to a March 31, 2002 New York Times article discussing DLJ's alleged involvement with Enron (id. at 78).[10] Thus, Plaintiffs had all the "information necessary" to name CSFB (USA) Inc. and DLJ at the time they filed their original complaint on April 8, 2002.

* * *

Moreover, regardless of when notice was triggered, Plaintiffs cannot maintain any claims based on the September 1999 Osprey offering because that offering occurred more than three years prior to May 14, 2003, and is therefore barred by the three year statute of repose. (Mem. at 12.) Plaintiffs' attempt to rely on Sarbanes-Oxley to evade this conclusion (Opp. at 10), fails because Sarbanes-Oxley does not apply for the reasons set forth above.

---

[10] The New York Times article was not the only publicly available information regarding DLJ's relationship with Enron available prior to April 8, 2002. For example, a January 14, 2002, Wall Street Journal article identified a "DLJ-related limited partnership" as one of a "gaggle of . . . financial firms" that "joined Merrill in investing in LJM2, apparently in hopes of further cultivating ties with Enron, which at the time was one of Wall Street's hottest clients." John R. Emshwiller et al., *Deals & Deal Makers: How Wall Street Greased Enron's Money Engine*, Wall St. J., Jan. 14, 2002, at C1 (attached hereto as Ex. F). The article also discusses DLJ's alleged involvement with LJM2--the very involvement of which Plaintiffs now claim to have been unaware at the time they filed their original complaint. See Whirlpool Fin. Corp. v. GN Holdings, Inc., 67 F.3d 605, 610 (7th Cir. 1995) ("A reasonable investor is presumed to have information available in the public domain, and therefore [plaintiff] is imputed with constructive knowledge of this information.") (dismissing claims as time-barred).

D. The Amended Complaint Does Not Relate Back to the Original Consolidated Complaint.

Plaintiffs contend that their newly added claims relate back to the original consolidated complaint because: (1) the new allegations are based on the same transaction or occurrence of the original complaint, under Fed. R. Civ. P. 15(c)(2) (Opp. at 19); and (2) CSFB (USA) Inc. and DLJ (i) had notice of the new claims through their "identity of interest" to CSFB LLC such that they would not be prejudiced in their defense, and (ii) were omitted from the original complaint due to a mistake of fact (id. at 20-29), under Fed. R. Civ. P. 15(c)(3). Plaintiffs--who must prove both of these grounds for their new claims to relate back under Rule 15--are wrong on each.

1. Plaintiffs have failed to satisfy the requirements of Rule 15(c)(2) for the relation back of their new '33 Act claims.

First, with respect to the new '33 Act claims, Plaintiffs have not shown that the new allegations about the Marlin and Osprey offerings arise from the same conduct, transaction or occurrence set forth in their original pleading.

"Congress did not intend rule 15(c) to be so broad as to allow an amended pleading to add an entirely new claim based on a different set of facts." Pruitt v. United States, 274 F.3d 1315, 1318 (11th Cir. 2001). As such, courts have resisted plaintiffs' attempts to define the conduct, transaction or occurrence broadly to include the subject-matter of the entire litigation as a whole, and instead have focused upon the particular component of that litigation upon which the plaintiff chose to base his original complaint. See id. at 1319 (finding plaintiff's amended claims "too far removed from his original claims to 'relate back'" because his original petition addressed sentencing errors and the amended petition addressed trial errors); see also In re Coastal Plains, Inc., 179 F.3d 197, 216 (5th Cir. 1999) (rejecting plaintiffs' claim that newly added claim for tortious interference related back to claim for failure to return inventory); Sierra

Club v. Penfold, 857 F.2d 1307, 1316 (9th Cir. 1988) (finding an amended complaint regarding defendant's conduct in adopting a set of regulations did not relate back to a complaint regarding defendant's policy and practice with respect to those regulations, thereby rejecting the argument that the relevant transaction was the entire controversy over the regulations).

Here, although Plaintiffs knew about and referenced the Marlin and Osprey transactions in the original consolidated complaint, they conspicuously failed to allege any misstatements with respect to them until the filing of the Amended Complaint on May 14, 2003. Because each alleged misstatement "constitutes a separate claim", Plaintiffs' generic allegations about other Enron misstatements in other offerings are insufficient for relation back. Westinghouse Elec. Corp. v. Franklin, 789 F. Supp. 1313, 1319 n.14 (D.N.J. 1992) (holding that alleged omissions in proxy statement did not relate back to a complaint alleging the same omissions in a different proxy statement because "each alleged omission requires proof of independent facts and constitutes a separate claim"), rev'd on other grounds, 993 F.2d 349 (3d Cir. 1993). Moreover, Plaintiffs' attempt to distinguish Westinghouse (and the other cases) as involving complaints alleging misstatements in "completely different transactions" (Opp. at 33 n.25) simply proves the point: Marlin and Osprey are different transactions with different alleged misstatements from those alleged in the original consolidated complaint.[11]

[11] Watkins v. Lujan, 922 F.2d 261 (5th Cir. 1991) (cited in Opp. at 19), further illustrates the point. In Watkins, the plaintiff initially filed suit alleging employment discrimination under Title VII, amended her complaint in favor of a § 1981 cause of action, and subsequently sought to amend her complaint again to re-raise Title VII. Id. at 262-63. The court permitted relation back because "both causes of action were based upon the same facts and allegations of discrimination" and relation "is controlled not by the caption given a particular cause of action, but by the underlying facts upon which the cause of action is based". Id. at 265. In other words, relation back was permissible because the plaintiff merely changed the legal theory upon which her claim was based, not the factual underpinning of the claim itself. Here, by contrast, Plaintiffs' Section (12)(a)(2) claims are entirely new, based upon factual theories (as well as legal theories) not previously asserted.

2. Plaintiffs have failed to satisfy the requirements of Rule 15(c)(3) for the relation back of their new claims with respect to the newly added defendants.

Plaintiffs also fail to meet the high burden set by Rule 15(c)(3) for the addition of new parties. Under that Rule, Plaintiffs must demonstrate not only that the new allegations arise out of the "same conduct, transactions or occurrence", but also that DLJ and CSFB (USA) Inc. were on notice of the claims such that they would not be prejudiced in their defense and that DLJ and CSFB (USA) Inc. "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against [them]". Plaintiffs can show neither.

First, even if there is an "identity of interest" among CSFB LLC, CSFB (USA) Inc. and DLJ because they are now affiliated entities represented by the same counsel (Opp. at 20-24), Plaintiffs have failed to meet the notice requirement of Rule 15(c)(3)(A). The reason CSFB (USA) Inc. and DLJ were not on notice that they would be sued is not because they were unaware of the lawsuit, but instead because they were aware of the lawsuit and of Plaintiffs' deliberate choice not to assert claims against them in the original consolidated complaint. Given that Plaintiffs were aware both of the Marlin and Osprey offerings (Orig. Compl. ¶¶ 20, 48-49, 83(ii), 497-504, 699, 707) and of the existence and relationships of CSFB (USA) Inc. and DLJ to CSFB LLC (id. ¶¶ 102(c), 707), CSFB (USA) Inc. and DLJ reasonably believed that Plaintiffs' decision not to seek recovery on those transactions or from them was deliberate.

Second, even if there were adequate notice, Plaintiffs cannot show that their failure to name CSFB (USA) Inc. or DLJ was the result of "a mistake concerning the identity of the proper party". Fed. R. Civ. P. 15(c)(3)(B) (emphasis added). Plaintiffs purport to have made numerous "factual mistakes" about the corporate identities of CSFB (USA) Inc., CSFB LLC and DLJ in the original consolidated complaint. (Opp. at 27-29.) The Amended Complaint,

however, contains no new facts about CSFB LLC, CSFB (USA) Inc. or DLJ that demonstrate any mistake in Plaintiff's prior pleading. Indeed, there are no factual allegations (other than the allegations about their corporate existence, see Am. Compl. ¶ 102) about CSFB (USA) Inc. or DLJ contained in the Amended Complaint, and the "facts" Plaintiffs claim to have learned about those two entities contained in Plaintiffs' Opposition may not be considered on a motion to dismiss. See Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984) ("[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss."). Moreover, the original complaint itself makes clear that Plaintiffs understood as of April 8, 2002, that there were three different entities--what they then called "CSFB Corp." (now CSFB LLC), "Donaldson, Lufkin & Jenrette Securities Corporation" and "Credit Suisse First Boston (USA) Inc."--and yet chose to name only a single one, CSFB LLC. Thus, this was not a matter of misnomer; it was matter of choice. See Wells v. HBO & Co., 813 F. Supp. 1561, 1567 (N.D. Ga. 1992) (cited in Opp. at 27, n.20) (finding that an amended complaint did not relate back to the original complaint with respect to additional named defendants because "even the most liberal interpretation of 'mistake' cannot include a deliberate decision not to sue a party whose identity plaintiff knew from the outset").[12]

[12] Plaintiffs' remaining cases are similarly unavailing because in each, the plaintiff(s) had no knowledge of the existence and/or culpability of the newly added defendants. See Berrios v. Sprint Corp., CV-97-0081 (CPS), 1997 U.S. Dist. LEXIS 19259 at *17-*18 (E.D.N.Y. Nov. 13, 1997) (plaintiff knew of neither the existence nor the potential involvement of the newly added defendant prior to the filing of her amended complaint); Zimmer v. United Dominion Indus., Inc., 193 F.R.D. 620, 622 (W.D. Ark. 2000) (plaintiff did not learn that the product at issue was manufactured by another company until the named defendant disclosed this fact in its motion for summary judgment); Aerotel, Ltd., v. Sprint Corp., 100 F. Supp. 2d 189, 190-91 (S.D.N.Y. 2000) (plaintiffs sought to add Sprint Communications, Sprint Spectrum and Tandy Corporation as defendants after Sprint Corporation filed its motion to dismiss for lack of personal jurisdiction); Graham v. Gendex Med. X-Ray, Inc., 176 F.R.D. 288, 289 (N.D. Ill. 1997) (plaintiff only learned from answer of named defendant, "Gendex-Del Medical Imaging Corp.", that the company that had actually employed and discharged plaintiff was, in fact, "Gendex Medical X-Ray Inc."); Coelho v. Seaboard Shipping Corp., 535 F. Supp. 629, 636 (D.P.R. 1982)

II. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM AGAINST CSFB (USA) INC. AND DLJ UNDER SECTION 10(b).[13]

Plaintiffs do not dispute that the sole effort they made to plead the Section 10(b) claims against the new defendants, CSFB (USA) Inc. and DLJ, was to redefine the term "CS First Boston" to include three entities rather than one. (Mem. at 13-15.) Nor do they distinguish any of the authority provided in our opening memorandum holding that such collective pleading fails to satisfy the heightened requirements of the PSLRA or Rule 9(b)'s particularity requirement. (Id.) Instead, Plaintiffs make a plea for leniency, arguing that they should not be held to the "hyper-technical" requirements of the PSLRA and the Federal Rules because "CSFB LLC knows which actions are attributable to it and which were performed by DLJ". (Opp. at 73-74.) What a defendant may know on its own, however, is not the test for stating a claim under Rules 9(b) and 12(b)(6).

On a motion to dismiss a Section 10(b) claim, the Court is "obliged to go through the complaint allegation by allegation in order to determine if claims are specifically alleged against each named defendant." Weber v. Contempo Colours, Inc., 105 F. Supp. 2d 769, 772 (W.D. Mich. 2000) (emphasis added) (citation omitted). Thus, where Section 10(b) claims "involve multiple defendants, the alleged fraudulent conduct of each defendant must be set forth separately." In re Envoy Corp. Sec. Litig., 133 F. Supp. 2d 647, 659 (M.D. Tenn. 2001) (emphasis added); see also Double Alpha, Inc. v. Mako Partners, L.P., No. 99 Civ. 11541, 2000

(plaintiffs only learned from defendant "Moran Towing and Transportation Corp. Inc.'s" reply in opposition of summary judgment that an employee of Moran Towing Corp. had misrepresented the real ownership of the boat in question to the Coast Guard).

[13] Because the Court has already ruled on the Section 10(b) claims against it, CSFB LLC has not moved to dismiss the Amended Complaint on that cause of action. (Mem. at 2 n.2.) Thus, Plaintiffs are wrong that "the CSFB Defendants wish to re-litigate issues already determined by the Court". (Opp. at 73.) The Court has never considered the sufficiency of the Section 10(b) allegations as to CSFB (USA) Inc. or DLJ.

WL 1036034, at *7 (S.D.N.Y. July 27, 2000) ("[W]hen fraud is alleged against multiple defendants, a plaintiff must . . . set[] forth separately the acts complained of by each defendant."). In addition, Rule 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). "Pleading fraud with particularity in this circuit requires 'time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby.'" Williams v. WMX Tech. Inc., 112 F.3d 175, 177 (5th Cir. 1997) (quoting Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1068 (5th Cir. 1994)); accord Melder v. Morris, 27 F.3d 1097, 1100 n.5 (5th Cir. 1994).

As we showed in our opening memorandum, Plaintiffs have not even tried to meet these standards with respect to CSFB (USA) Inc. or DLJ. (See Mem. at 14-15.) In Plaintiffs' original consolidated complaint, plaintiffs made voluminous allegations directed solely to CSFB LLC, and the Court upheld those allegations as to CSFB LLC. Even under the more "relaxed" pleading standard urged by Plaintiffs, Plaintiffs cannot simply take those exact same allegations and now insist that they all also apply indiscriminately to CSFB (USA) Inc. (a holding company) and DLJ (a separate broker/dealer that was a direct competitor of CSFB LLC). See McNamara v. Bre-X Minerals Ltd., 197 F. Supp. 2d 622, 673 (E.D. Tex. 2001) ("Even under the slightly relaxed application of Rule 9(b) . . . boilerplate and conclusory allegations will not suffice. Plaintiffs must accompany their legal theory with specific factual allegations.") (citation omitted); Tuchman,14 F.3d at 1068 (stating that the "luxury" of a relaxed pleading standard "must not be mistaken for license to base claims of fraud on speculation and conclusory allegations") (citation omitted).

Nor can Plaintiffs shift their pleading burden to CSFB LLC by arguing that CSFB LLC's Answer to the original consolidated complaint eliminates "any confusion as to who did what". (Opp. at 75.) As an initial matter, the sufficiency of the Amended Complaint is to be judged solely on its own allegations, and not on unalleged facts contained in CSFB LLC's Answer to the original consolidated complaint.[14] Notably, Plaintiffs have not incorporated CSFB LLC's Answer into the Amended Complaint, nor made any attempt to include that information in the Amended Complaint; if (as Plaintiffs claim) CSFB LLC's Answer "admits that a great many of the allegations concern DLJ" such that "there can be no confusion as to who did what" (Opp. at 75), it should have been easy for Plaintiffs to plead particularized facts (at least as to DLJ) using those alleged admissions. See Shushany v. Allwaste, Inc., 992 F.2d 517, 523 (5th Cir. 1993) (dismissing complaint for lack of particularity where plaintiff "demonstrated a greater knowledge of the factual basis for the fraud claims than appears in the complaint, yet no effort was made to amend it to include these details").

Moreover, CSFB LLC's Answer denied many of the allegations set forth in Plaintiffs' original complaint. Each of CSFB LLC, DLJ and CSFB (USA) Inc. is entitled to know which of them (if any) faces each of those allegations. It is not up to defendants--even affiliated ones--to figure that out for themselves.[15] See In re Envoy, 133 F. Supp. 2d at 659

---

[14] The fact that, following the denial of its motion to dismiss, CSFB LLC answered the original complaint rather than moving for a more definite statement is not "telling" (Opp. at 74)--it's irrelevant. The issue now presented is not whether the Plaintiffs could have stated their claims more particularly against CSFB LLC, but instead whether there are any particularized allegations against the two new defendants, DLJ and CSFB (USA) Inc.

[15] Of course, the fact that the newly added parties are corporate entities rather than "individual human beings" does not excuse Plaintiffs from their pleading burdens. (Opp. at 75.) Nor does the PSLRA stay that was in effect until April 2003 absolve Plaintiffs of complying with the PSLRA and Rule 9(b). (Opp. at 34-35.) Indeed, one of the purposes of Rule 9(b) is to ensure that a plaintiff "know[s] what his claim is when he files" it. Benoay v. Decker, 517 F. Supp. 490, 492 (E.D. Mich. 1981), aff'd, 735 F.2d 1363 (6th Cir. 1984).

(requiring particularity because "each defendant named in the complaint is entitled to be apprised of the circumstances surrounding the fraudulent conduct with which he individually stands charged") (citations omitted). This is particularly true for the heightened scienter requirement for Section 10(b). See In re Sec. Litig. BMC Software, 183 F. Supp. 2d 860, 886 (S.D. Tex. 2001) (holding that to satisfy the scienter requirement, plaintiffs must "specifically plead what [defendant] learned, when [defendant] learned it, and how Plaintiffs know what [defendant] learned"); Zishka v. Am. Pad & Paper Co., No. 3:98-CV-0660-M, 2000 WL 1310529, at *3 (N.D. Tex. Sept. 13, 2000) ("Plaintiffs must allege what each of the [defendants] knew, who specifically knew it, and when they learned it.").

Finally, with respect to scienter, Plaintiffs have failed to make any showing of scienter by CSFB (USA) Inc. or DLJ, much less particularized facts "giving rise to a strong inference" that each of those defendants--individually--acted "with the required state of mind". 15 U.S.C. § 78u-4(b)(2). Recognizing their deficiency, Plaintiffs again resort to collectively pleading and to borrowing the allegations upheld against CSFB LLC. (Opp. at 77 ("[P]laintiffs' substantive allegations in this regard have not changed" and the "admissions by CSFB LLC bankers . . . are attributable to each of the CSFB Defendants and demonstrate that each of the CSFB Defendants acted with scienter.").) Indeed, Plaintiffs go so far as to argue that "the Court need not even address this already-decided issue of scienter." (Id.) But the scienter of CSFB (USA) Inc. or DLJ has never been presented to--or decided by--this Court.

Plaintiffs are also wrong that CSFB LLC's alleged scienter "can be imputed" to "each of the CSFB Defendants". (Opp. at 77 (arguing that "each of the CSFB Defendants is tainted with the scienter flowing from" CSFB LLC's structured finance group.) See McNamara v. Bre-X Minerals Ltd., 57 F. Supp. 2d 396, 428 (E.D. Tex 1999) ("a subsidiary's [alleged] fraud

cannot be automatically imputed to its corporate parent") (quoting In re Baesa Sec. Litig., 969 F. Supp. 238, 242 (S.D.N.Y. 1997)). This is particularly true since, for much of the class period, CSFB LLC and DLJ were separate and competing entities with knowledge independent from the other. Moreover, group pleading "does not apply to the Reform Act's scienter requirement"; rather, a complaint must allege scienter as to "each separate defendant . . . with respect to each act or omission alleged". Holmes v. Baker, 166 F. Supp. 2d 1362, 1376 (S.D. Fla. 2001). The Amended Complaint's failure to do so is reason alone to dismiss the claims § 10(b) against CSFB (USA) Inc. and DLJ. See 15 U.S.C. § 78u-4(b)(3).

III. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER SECTION 12(a)(2) AGAINST CSFB LLC OR DLJ.

Plaintiffs contend that they have adequately pleaded their claims under Section 12(a)(2) because they do not yet need to show standing and because there is an unresolved question of fact as to whether the Marlin and Osprey placements were public offerings for the purposes of Section 12(a)(2). (Opp. at 38.) Plaintiffs are wrong as to both: first, it is well-settled that, even at this stage of the litigation, at least one named plaintiff must have actually purchased the securities at issue; and second, Gustafson clearly exempts unregistered private placements made pursuant to Regulation S and Rule 144A without a prospectus--such as the Marlin and Osprey placements--from liability under Section 12(a)(2).

A. Plaintiffs Concede That They Lack Standing To Bring Their Section 12(a)(2) Claims.

In our opening memorandum, we demonstrated that Plaintiffs' Section 12(a)(2) claims against CSFB LLC and DLJ (and, along therewith, Plaintiffs' related Section 15 claim against CSFB (USA) Inc.) must be dismissed because no named plaintiff actually purchased any securities in the Marlin or Osprey offerings. (Mem. at 18.) In their opposition, Plaintiffs are forced to concede that they have no purchaser and, therefore, there is no factual basis for them to

have alleged that "plaintiffs sustained substantial damages in connection with their purchases of the [Marlin and Osprey notes]." (Am. Compl. ¶ 1016.9; Opp. at 3, 46-48.) Having suffered no injury, Plaintiffs lack standing to maintain these claims. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Moreover, since no named plaintiff purchased any Marlin or Osprey securities, Plaintiffs also fail to meet the additional requirements that a plaintiff have purchased from a defendant in the offering. See 15 U.S.C. §77*l* (Section 12 claims under the '33 Act can only be brought by "the person purchasing such security"); Pinter v. Dahl, 486 U.S. 622, 647 (1988); Cyrak v. Lemon, 919 F.2d 320, 324-25 (5th Cir. 1990); In re Paracelsus Corp., Sec. Litig., 6 F. Supp. 2d 626, 631 (S.D. Tex. 1998) (dismissing plaintiffs' Section 12 claims in a consolidated class action because "Plaintiffs concede in their Response that none of the Plaintiffs acquired any of the notes [and] therefore have failed to plead the express statutory standing requirements for an action under [Section 12]").

Plaintiffs do not contest their lack of standing. (Opp. at 3, 47.) Instead, they urge the Court to defer ruling on their standing until the Court considers Plaintiffs' pending motion for class certification. (Id.) Such delay would be futile, however, since Plaintiffs cannot represent a class to which they do not belong. See Lewis v. Casey, 518 U.S. 343, 357 (1996) ("[E]ven named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.") (internal quotation marks omitted); In re Taxable Mun. Bond Sec. Litig., 51 F.3d 518, 522 (5th Cir. 1995) ("[I]t is well-established that to have standing to sue as a class representative it is essential that a plaintiff must be part of that class . . . .") (internal quotation marks and alterations omitted); see also Franze v. Equitable

Assurance, 296 F.3d 1250, 1254 (11th Cir. 2002) (holding that a plaintiff lacking standing cannot satisfy the prerequisites for class representation under Rule 23(a)).

Neither can Plaintiffs save their Section 12(a)(2) claims based on their unverified representation that they are "aware of an institution which purchased securities that are the subject of the §12(a)(2) claims" and "is preparing a motion to intervene". (Opp. at 3, 47.) Standing, like other bases for jurisdiction, "must exist at the commencement of the litigation". Goldin v. Bartholow, 166 F.3d 710, 717 (5th Cir. 1999); see also Lujan, 504 U.S. at 570 n.5 ("[S]tanding is to be determined as of the commencement of suit."). Furthermore, there has been no submission or notice of intention from this purported intervenor; the Amended Complaint contains no allegations that the purported intervenor purchased Marlin or Osprey securities; and there is no indication that, even if the intervenor did purchase Marlin or Osprey notes, it purchased any of them from CSFB LLC or DLJ. Thus, Plaintiffs' "expect[ed]" intervenor cannot save their claims.

B. Plaintiffs Concede That They Did Not Purchase Marlin or Osprey Notes "Pursuant to a Prospectus".

Plaintiffs similarly concede (as they must) that Section 12(a)(2) requires that a defendant sell securities to the plaintiff "by means of a prospectus", and that a security is sold "by means of a prospectus" only when it is sold in a "public offering". (Opp. at 40; Mem. at 17.) Accord Gustafson v. Alloyd Co., 513 U.S. 561, 571-72 (1995); Lewis v. Fresne, 252 F.3d 352, 357 (5th Cir. 2001). Accordingly, Plaintiffs' claims can only be sustained if they purchased the Marlin and Osprey notes in an public offering.

Plaintiffs argue that the placements should be considered public (at least on a motion to dismiss) because the Marlin and Osprey notes "were issued for public listing and public trading on the Luxembourg stock exchange". (Opp. at 41 (citing to Am. Compl. ¶¶ 641.3,

641.21, 641.37); see also Opp. at 44.) Even if true, that allegation does not save Plaintiffs' claims, both because Plaintiffs concede that they never purchased Marlin or Osprey securities through the Luxembourg exchange (Opp. at 44), and because Section 12(a)(2) would not reach such secondary purchases in any event, see Gustafson, 513 U.S. at 571; Rosenzweig v. Azurix Corp., 332 F.3d 854, 871-72 (5th Cir. 2003) (Section 12 does not reach private secondary transactions). To the contrary, Plaintiffs assert that they purchased those securities "in the offering" (Opp. at 44), even as they simultaneously admit to having no purchaser (see supra Part III.A). In any event, this argument has already been rejected in Laser Mortgage Management, Inc. v. Asset Securitization Corp., No. 00 Civ. 8100, 2001 WL 1029407, at *8-*9 (S.D.N.Y. Sept. 6, 2001), in which defendants offered two classes of securities: one to the public by means of a prospectus, and the other to qualified buyers pursuant to a Private Placement Memorandum ("PPM") (which incorporated the public prospectus by reference). Id. at *1, *3. Plaintiff, a purchaser only of the private securities, argued that its purchases were nevertheless covered by Section 12(a)(2) because the PPM incorporated the publicly filed prospectus. The court rejected this argument because plaintiff bought its securities "by means of" the PPM, not "by means of a prospectus." Id. at *8. The same result should pertain here.

Moreover, on their face, the Marlin and Osprey Offering Memoranda provided that the notes were to be distributed by means of an unregistered, private placement to qualified institutional buyers--and not to the public. (Mem. at 20, Exs. A-C.)[16] Those documents further

[16] The Offering Memoranda for the Marlin and Osprey placements are attached to our Opening Memorandum as Exhibits A-C. The Court may consider the contents of these documents on a motion to dismiss. See United States ex rel. Willard v. Humana Health Plan of Tex., No. 02-40285, 2003 WL 21467963 at *2 (5th Cir. June 26, 2003) ("In deciding a motion to dismiss the court may consider documents attached to or incorporated in the complaint and matters of which judicial notice may be taken.") (citing Lovelace v. Software Spectrum Inc., 78 F.3d 1015, 1017-18 (5th Cir. 1996)).

provided that the Marlin and Osprey offerings were "NOT REGISTERED UNDER THE UNITED STATES SECURITIES ACT OF 1933" (id., Exs. A-C), which means none of the Offering Memoranda is a "prospectus" within the meaning of Section 12(a)(2) as a matter of law. Gustafson, 513 U.S. at 569 ("[W]hatever else 'prospectus' may mean, the term is confined to a document that, absent an overriding exemption, must include the 'information contained in the registration statement.'").

Finally, Plaintiffs attempt to avoid inevitable dismissal by arguing that the Court cannot decide now whether the offerings were public or private because that "is a question of fact" that "must be construed in plaintiffs' favor". (Opp. at 40-41.) The principal case Plaintiffs rely upon in support of that proposition, however, clearly states that "Section 12 of the 1933 Act does not apply to private transactions." Lewis v. Fresne, 252 F.2d 352, 358 (5th Cir. 2001) (cited in Opp. at 41).[17] Moreover, conclusory allegations--such as Plaintiffs' assertion that the Marlin and Osprey placements were public in the face of all facts to the contrary--"do not defeat a motion to dismiss". In re Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549, 564 n.3 (S.D. Tex. 2002). Nor is Plaintiffs' position supported by any relevant law post-dating Gustafson.[18]

---

[17] Plaintiffs' contention that the size of Marlin and Osprey placements is somehow relevant to whether they were public or private (Opp. at 41) is also inconsistent with well-settled caselaw. See, e.g., SEC v. Ralston Purina, 346 U.S. 119, 125 (1953) (noting that "there is no warrant for superimposing a quantity limitation on private offerings as a matter of statutory interpretation").

[18] All but one of the cases Plaintiffs cite to support their proposition that a question of fact is involved in determining whether an offering is public for the purposes of 12(a)(2) either pre-date Gustafson or rely upon cases that pre-date Gustafson. The one exception, Sloane Overseas Fund, Ltd. v. Sapiens International Corp., 941 F. Supp. 1369, 1376 (S.D.N.Y. 1996), is inapposite because defendants in Sloane did not contend, as here, "that the Note offering was private." Id. at 1376 n.11. In any event, the Sloane court's holding that Section 12(a)(2) reaches an offering made without a prospectus is directly contrary to the express language of the statute and Gustafson, and has not been followed by any other court. Instead, the overwhelming weight of authority follows Gustafson. See, e.g., In re Hayes Lemmerz Int'l, Inc. Equity Sec. Litig.,

IV. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR CONTROL PERSON LIABILITY AGAINST ANY OF CSFB LLC, CSFB (USA) INC. OR DLJ.

Plaintiffs also cannot avoid dismissal of their control person claims against CSFB LLC and DLJ (under Section 20(a) of the '34 Act) and CSFB (USA) Inc. (under Section 20(a) of the '34 Act and Section 15 of the '33 Act). The sole control person allegation as to those defendants, which Plaintiffs repeat three times in the Amended Complaint, is that CSFB (USA) Inc. controlled CSFB LLC and DLJ by virtue of its corporate relationship to those entities as parent. (Am. Compl. ¶¶ 102, 995.1, 1016.2; see also Opening Mem. at 19-21.) As a matter of law, that is insufficient to sustain Plaintiffs' claims.[19] In response, Plaintiffs make three arguments, none of which can save these claims.

First, Plaintiffs argue that the sufficiency of these claims cannot be decided on a motion to dismiss because "control person liability is fact-intensive" and requires "at least some discovery to make an informed ruling". (Opp. at 51.) That, of course, is not true; courts routinely dismiss control person claims at the pleading stage where the allegations are insufficient. See, e.g., Dartley v. Ergobilt Inc., No. CIV. A. 398CV1442M, 2001 WL 313964, at

---

No. 01-CV-73433, 02-CV-71778 2003 WL 21692102 *17 (E.D. Mich. July 21, 2003) (rejecting Section 12(a)(2) liability under Gustafson despite plaintiffs' argument that a private placement offering memorandum was public because it was widely disseminated); In re Sterling Foster & Co. Sec. Litig., 222 F. Supp. 2d 216, 244 (E.D.N.Y. 2002) ("Courts in this Circuit have applied the rationale of [Gustafson's] dicta to reach what is now the predominate conclusion that purchasers in private or secondary market offerings are precluded from bringing actions under Section 12(a)(2)."); In re Musicmaker.com Sec. Litig., No. CV00-2018 CAS (MANX), 2001 WL 34062431 *15 (C.D. Cal June 4, 2001) (rejecting Section 12(a)(2) claims because plaintiffs did not allege offerings were issued pursuant to a prospectus as required by Gustafson); Laser Mortgage, 2001 WL 1029407 at *9 (same); Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc., 165 F. Supp. 2d 615, 621-22 (S.D.N.Y. 2001) (same); Walltree Ltd. v. ING Furman Selz LLC., 97 F. Supp. 2d 464, 470 (S.D.N.Y. 2000) (dismissing Section 12(a)(2) claims despite plaintiff's argument that securities were sold in a "public offering" because, among other things, plaintiffs "[did] not allege the existence of a prospectus").

[19] For the reasons set forth above and in our opening memorandum, the Court need not reach the substantive merits of the control person claims because those claims are time-barred and because Plaintiffs failed to show the requisite primary violations. (Mem. at 19-20.)

*1 (N.D. Tex. Mar. 29, 2001) (dismissing control person claims); In re VMS Sec. Litig., 752 F. Supp. 1373, 1399 (N.D. Ill. 1990) (dismissing "underwriters, guarantors, advisors and appraisers" because they "cannot be liable . . . as controlling persons"); In re Landry's Seafood Rest. Inc. Sec. Litig., No. H-99-1948, slip op. at 11-12 n.14 (S.D. Tex. Feb. 20, 2001) ("Although whether a defendant is a control person is usually a question of fact, dismissal is appropriate where the plaintiff fails to plead any facts from which it can reasonably be inferred that the particular defendant was a control person."); In re Sec. Litig. BMC Software, Inc., 183 F. Supp. 2d at, 916-17 (dismissing control person claims). Indeed, this Court did just that with respect to some of the individual defendants' motions. See In re Enron Corp. Sec., Derivative & ERISA Litig., Nos. MDL-1446, Civ. A. H-01-3624, 2003 U.S. Dist. LEXIS 1668, at *75 (S.D. Tex. Jan 28, 2003).

Second, Plaintiffs contend that "the Bank Defendants grossly distort the law concerning control person liability, misapplying precedent of this Court and the Fifth Circuit". (Opp. at 51.) For their part, Plaintiffs argue that the Fifth Circuit requires only "abstract power" to control another and that "[a]ctual exercise of that power is not required". (Opp. at 52 (citing G.A. Thompson & Co. v. Partridge, 636 F.2d 945, 957 (5th Cir. 1981) and McNamara v. Bre-X Minerals Ltd., 46 F. Supp. 2d 628, 638 (E.D. Tex. 1999)).) However, the Fifth Circuit held more recently in Dennis v. General Imaging, Inc., 918 F.2d 496, 509 (5th Cir. 1990), that plaintiffs were required to allege that the controlling person "had actual power or influence over the controlled person" and must have "induced or participated in the alleged violation" in order to state a claim. Soon thereafter in Abbott v. Equity Group, Inc., 2 F.3d 613, 620 (5th Cir. 1993) (cited in Opp. at 53), the Fifth Circuit acknowledged the uncertainty as to whether an allegation of actual control is required. Id. at 620. Thus, as this Court has observed, the Fifth Circuit "has

not clearly defined its position" concerning the standard for control person liability. In re Enron, 2003 U.S. Dist. LEXIS, at *9.

What is clear, however, is that Plaintiffs do not state a claim against CSFB LLC, DLJ or CSFB (USA) Inc. under any applicable standard. That is because, regardless of which standard applies, Plaintiffs must allege some "particularized facts as to the controlling person's culpable participation in (exercising control over) the 'fraud perpetrated by the controlled person'". In re Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d at 598 (citation omitted) (emphasis added); Collmer v. U.S. Liquids, Inc., No. H-99-2785, 2001 U.S. Dist. LEXIS 23518, at *10 n.7 (S.D. Tex. Jan. 23, 2001) (same). Here, Plaintiffs have failed to plead any such facts, and it is simply not enough that Plaintiffs' counsel are aware of and "restate the legal standard for control person liability". Copland v. Grumet, No. CIV.A. 96-3351 MLP, 1998 WL 256654, at *15 (D.N.J. Jan. 9, 1998). (See Am. Compl. ¶¶ 102, 995.1, 1016.2 (reciting boilerplate language).)

Finally, Plaintiffs argue that Section 20(a) "may allow plaintiffs to reach defendants that control wrongdoers through holding companies", such as CSFB (USA) Inc. (Opp. at 53 (citing In re Enron, 2003 U.S. Dist. LEXIS 1668, at *44 n.22).) The excerpt Plaintiffs cite, however, makes clear (in portions not quoted by Plaintiffs) that such liability is reserved for holding companies improperly used to protect "behind-the-scene actors" in order to catch those "who might attempt to evade liability under common law principles by utilizing 'dummies' that would act in their place and under their control". In re Enron, 2003 U.S. Dist. LEXIS 1668, at *44 n.22. No such allegations are made here against CSFB (USA) Inc. The mere fact that an entity is a holding company does not relieve Plaintiffs of their burden to plead facts sufficient to establish control.

Conclusion

For the foregoing reasons and the reasons set forth in our Opening Memorandum, the Court should dismiss the Amended Complaint in its entirety against CSFB (USA) Inc. and DLJ, and should dismiss the Section 12(a)(2) and Section 20(a) claims against CSFB LLC.

Dated: July 31, 2003

Respectfully submitted,

Lawrence D. Finder /by permission

Lawrence D. Finder
Southern Dist. Id. No. 602
Texas Bar No. 07007200
HAYNES AND BOONE, LLP
1000 Louisiana Street, Suite 4300
Houston, TX 77002-5012
Telephone: (713) 547-2000
Telecopier: (713) 547-2600

ATTORNEY-IN-CHARGE FOR CREDIT SUISSE FIRST BOSTON LLC, CREDIT SUISSE FIRST BOSTON (USA), INC. AND PERSHING LLC

OF COUNSEL:

Richard W. Clary
Julie A. North
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
Telephone: (212) 474-1000
Telecopier: (212) 474-3700

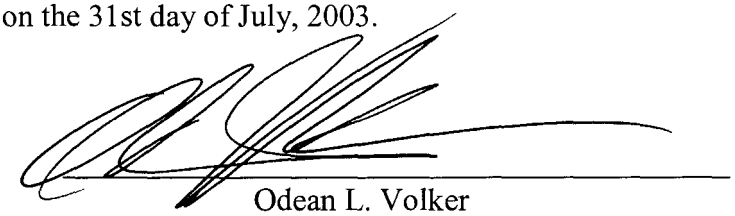
George W. Bramblett, Jr.
Southern Dist. Id. No. 10132
Texas Bar No. 02867000
Noel M.B. Hensley
Southern Dist. Id. No. 10125
Texas Bar No. 09491400
HAYNES AND BOONE, LLP
901 Main Street, Suite 3100
Dallas, TX 75202-3789
Telephone: (214) 651-5000
Telecopier: (214) 651-5940

Odean L. Volker
Southern Dist. Id. No. 12685
Texas Bar No. 20607715
HAYNES AND BOONE, LLP
1000 Louisiana Street, Suite 4300
Houston, TX 77002-5012
Telephone: (713) 547-2000
Telecopier: (713) 547-2600

ATTORNEYS FOR CREDIT SUISSE FIRST BOSTON LLC, CREDIT SUISSE FIRST BOSTON (USA) INC. AND PERSHING LLC

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorneys of record for all parties to the above cause through esl3624.com in accordance with the Court's order regarding website service on the 31st day of July, 2003.



Odean L. Volker

The Exhibit(s) May

Be Viewed in the

Office of the Clerk